Supreme Court, U.S.
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No. 99-51

In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Respondents define the issue as whether the act of leaving a ballot blank constitutes a "vote cast." They argue that it does, because it amounts to a choice of "nobody for Governor" and constitutes an "act of expressing dissatisfaction with the choices offered." (Respondents' Brief 6.) But there is no authority for this remarkable proposition in the statute governing Guam gubernatorial elections, 48 U.S.C. § 1422; there is no evidence in the legislature history that Congress intended "votes cast" to include those who – for whatever reason – choose not to express a choice for Governor; and it is contradicted by the applicable Guam election laws regarding the counting of votes, which have been approved by Congress. Moreover, it is contrary to this Court's longstanding election law principle that those who do not express a preference are presumed to assent to the expressed will of the majority of those voting. *County of Cass v. Johnston*, 95 U.S. 360, 369, 24 L.Ed. 416 (1877).

Indeed, any other system would be unworkable. As respondents concede, a "vote" means expressing a choice. (Respondents' Brief at 8, note 2.) *See also Burdick v. Takushi*, 504 U.S. 428, 438, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (rejecting argument that voter had constitutional right to write-in vote for Donald Duck; the function of election process is selection of candidate for office, not a more generalized expressive function). Under respondents' scenario, those who returned ballots on which the gubernatorial race were left blank would have to be canvassed to determine whether the blank ballot meant that they had no interest in voting in that race, overlooked

that part of the ballot, or were undertaking the "act of expressing dissatisfaction with the choices offered"; and the latter category would be included with the "votes cast," while the first two categories not. Surely if Congress had intended such a system, it would have made this clear in the statute.

Respondents' convoluted arguments notwithstanding, this is a simple case. The statute is not ambiguous. It requires a determination of the "votes cast," and the statute even tells how a vote is cast: "*by the casting* by each voter *of a single vote applicable to both offices* [Governor and Lieutenant Governor]." Moreover, Congressional interpretation is consistent with the obvious meaning of the statute. The "majority of the votes cast," with the procedure being the "casting by each voter of a single vote applicable to both offices," can only mean the consideration of *votes that are so cast* in the gubernatorial election.

ARGUMENT

I. THE PLAIN MEANING OF THE STATUTE AND CONGRESSIONAL STATEMENTS CONFIRM THAT ONLY *VOTES CAST* IN THE GOVERNOR'S ELECTION ARE TO BE COUNTED

Respondents ask this Court to equate blank ballots with write-in votes, arguing that both are political "acts." (Respondents' Brief 5-6.) Respondents also argue that ballots left blank as to the gubernatorial race should be counted as "votes cast" in the gubernatorial race if votes are cast on those ballots for other races in the general

election. (Respondents' Brief 7-9.)[1] But respondents also concede that "the starting point . . . is the language [of the statute] itself." (Respondents' Brief 6 (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978)). By any plain meaning test, a vote is not cast by leaving the ballot blank.[2] And specifically, as required by the statute, a vote is not cast "by the casting by each voter of a single vote applicable to both offices [Governor and Lieutenant Governor]" by *not* casting a single vote applicable to both of those offices, but voting, at the general election, in the races for the U.S. Delegate, the school board, or whatever other office might be up for election that day. The statute does not say that a vote is "cast" by simply returning a ballot, or by returning a ballot that contains no vote for Governor. There is no evidence whatsoever – either in the express terms of the statute or in its legislative history – to suggest that Congress intended that, in counting "votes cast" for the Governor and Lieutenant Governor, the "votes cast" *not* for Governor and Lieutenant Governor but instead in some other race should be considered.

This obvious proposition is confirmed by the statements of the House of Representatives in its consideration of the Blaz Contest. The issue there was the same as

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[1] It should be noted that the record does not even reveal whether the 1,313 ballots that were blank as to the gubernatorial contest contained votes as to other contests on the ballot or were blank as to them as well.

[2] *See, e.g.*, Black's Law Dictionary 1571 (7th ed. 1999) ("vote" defined as "the expression of one's preference or opinion by ballot, show of hands, or other type of communication"). "Vote" and "ballot" are simply not fungible.

that here: whether blank ballots should be considered in determining whether a candidate had obtained a majority of the "votes cast." The House answered: no. Although the federal statute providing for the election of Guam's non-voting Delegate to the House is not identical to Section 1422, the *House* stated that the statute being considered there was similar to the federal statutory language governing the election of Governors and non-voting Delegates from each of the Territories. And the House found that *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), was dispositive since it dealt with the "identical issue": "a voter who does not mark his ballot is presumed to assent to the choice of those who do."[3] Thus, the House of Represe.tatives has provided clear guidance of its understanding regarding the meaning of "votes cast" in the statute.

Respondents' attempts to justify the Court of Appeals' rewriting of the statute can only be characterized as verbal gymnastics. Respondents take the term "any election" out of context and attribute to it the definition of "votes cast," arguing that the "votes cast" provided for in Section 1422 – which statute deals exclusively with Guam's *gubernatorial* race – means votes cast for any office at the general election held that day. (Respondents' Brief 7-10.) The word "any" simply cannot carry this much baggage, particularly when it is referring to an "election," which is not an event but rather a contest or race. *See Foster v. Love*, 522 U.S. 67, 71, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997) ("election" refers to "the

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[3] *Dismissing the Election Contest Against Ben Blaz*, H.R. Rep. No. 220, 99th Cong., 1st Sess. (1985), at 4.

combined actions of voters and officials meant to make a final selection of an officeholder"; citing definition of "election" as " '[t]he act of choosing a person to fill an office' "); *United States v. Classic*, 313 U.S. 299, 318, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) ("election" is "the expression by qualified electors of their choice of candidates").

Moreover, notably, respondents do not argue that "any election" actually means *any* election. According to respondents, it does not mean any *gubernatorial election* (which, of course, is the only subject of Section 1422), but instead means the general election. However, it does not mean just *any* general election, but only the particular general election of which the gubernatorial election is a part. So respondents, while arguing that "any" is the operative word, actually try to read "any" out of the statute.

In the final analysis, the phrase "in any election" is not, as the Court of Appeals stated, a "nullity" if it refers to the gubernatorial election. When read in context – as it must be – it is clear that "in any election" refers to the various gubernatorial elections that are the very subject of Section 1422 – that is, the first one to be held on November 3, 1970 and each of the succeeding ones, to be held every four years, "*at* the general election" (emphasis added).[4]

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[4] The only other sentence of Section 1422 that respondents argue is meaningful for this analysis is: "The Governor of Guam . . . shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam." (Respondents' Brief 7.) It is hard to see the relevance of this sentence to the issue presented, however,

Respondents also argue that Congress should have added language to Section 1422 stating explicitly that it was referring to the *gubernatorial* election, and to the election for the office of *Governor*. (Respondents' Brief 10-13.)[5] But only as a result of the highly contorted position argued by respondents (and adopted by the Court of Appeals) would such additional language become necessary. The sole subject of Section 1422 is Guam's gubernatorial office and the election of Guam's Governor and Lieutenant Governor; no other offices – or elections – are addressed. Respondents' reading of the statute is contrary to common sense and logic, and does violence to the obvious and simple language and purpose of the statute, which is to provide for election of Guam's Governor.

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since the statute explicitly requires a winner to obtain "a majority of the votes cast." Respondents do not argue that the winner must obtain a majority of the *eligible voters*, whether or not they vote in the election. Instead, they simply try to argue that "ballots returned" means "votes cast" – a proposition not found anywhere in the statute.

[5] For example, respondents point to the statute providing for recall of a governor, which requires a two-thirds vote of the number of persons who had voted for the office of governor in the last election. 48 U.S.C. § 1422a. But such a specific definition is unnecessary in the statute dealing with *election* of the governor, because that very election is the subject of the statute itself; there is no need to define the number to win by referring to those voting at a different election. Indeed, if anything, Section 1422a shows that Congress intended to tie the number of votes required for a recall of the governor to the number of persons actually voting for governor. This cannot be reconciled with respondents' position that *election* of the governor is to be determined based on a consideration of ballots on which the person did not even cast a vote for that office.

II. *JOHNSTON* PROVIDES THE ANSWER IN THIS CASE: THOSE WHO DO NOT CAST A VOTE ARE NOT COUNTED

This Court has said that not voting cannot constitute the casting of a vote. "All qualified voters who absent themselves from an election duly called are presumed to assent to *the expressed will of the majority of those voting*, unless the law providing for the election otherwise declares." *County of Cass v. Johnston*, 95 U.S. 360, 369, 24 L.Ed. 416 (1877) (emphasis added). Thus, *Johnston* requires that non-voters not be counted, *unless* the statute expressly states otherwise. And Section 1422 does not expressly state otherwise. Respondents' attempt to distinguish *Johnston*, by discussing *State v. Winkelmeier*, 35 Mo. 103 (1864), is unavailing.[6]

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[6] In *Johnston*, the Court was considering whether a Missouri state statute conflicted with the Missouri Constitution. The statute allowed a township to subscribe to railroad company stock if "two-thirds of the qualified voters of the township, voting at an election called for that purpose, shall vote in favor of the subscription." The State Constitution allowed such a subscription only if "two-thirds of the qualified voters of the town, at a regular or special election to be held therein, shall assent thereto." 95 U.S. at 365. The Court interpreted the question to be whether the measure need receive the vote of two-thirds of those voting at the special election on the measure, or the vote of two-thirds of all of the town's qualified voters. The Court held that it was two-thirds of those voting on the measure.

In reaching this conclusion, the Court noted a number of Missouri state cases. One of the cases mentioned was *State v. Winkelmeier*, 35 Mo. 103 (1864) (which had been decided before the adoption of the Missouri State Constitution). There, the applicable statute expressly required a measure to be adopted

But this Court need not consult Missouri state law from the last century. As confirmed by the House in the Blaz Contest (by relying on *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982)), the holding in *Johnston* is broad enough to apply to voters who appear at the election and receive a ballot, but do not vote in a particular election. In both cases, "a voter who does not mark his ballot is presumed to assent to the choice of those who do." The *Johnston* principle cannot be successfully confined, as respondents contend, to voters who do not go to the polls at all. Like persons who stay home, persons who do not cast a vote in the gubernatorial race have not expressed their will in that contest and are properly presumed to assent to the expressed will of those who voted in the race.

In *Todman*, the Third Circuit decided the same issue presented here. In interpreting language in the Virgin Islands Elective Governor Act (48 U.S.C. § 1591) which is identical to the language in the Guam Elective Governor Act (48 U.S.C. § 1422), the Court had to address the issue of ballots left blank as to the governor's race, and

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by "a majority of the legal voters; that is, of all the legal voters of the city, and not merely of all those who might at a particular time choose to vote upon the question." 35 Mo. at 104. The Missouri court found that only 5,000 of those voting at the election – out of 13,000 – had voted in favor of it, and therefore that it had not obtained a majority. The Supreme Court in *Johnston* mentioned *Winkelmeier*, as well as a number of other Missouri cases, in the context of its consideration of whether the Missouri courts, as a practical matter, strictly enforced provisions requiring a majority of all the *qualified voters in the town*, or just those actually voting, and determined that the latter was the rule followed by the Missouri courts.

whether they should be counted in determining whether the candidate had received a majority of the "votes cast" within the meaning of the statute. The Third Circuit held that these ballots left blank as to the governor's race were not "votes cast": " 'voters . . . *not voting on the matter submitted* are presumed to assent to the expressed will of those attending and voting and *are not to be taken into consideration in determining the result.*' " 694 F.2d at 941 (emphasis added).

Todman is based on the principle enunciated by this Court in *Johnston*, and the common sense reading of the statute. Nevertheless, respondents argue that *Todman* is not persuasive because the Third Circuit there "noted" language from a Virgin Islands district court case, *Euwema v. Todman*, 323 F. Supp. 167 (D.V.I. 1971), the "holding" of which respondents claim the Third Circuit "misreads." (Respondents' Brief 20.) (The *Todman* court did not misread *Euwema* at all; it did not even characterize the holding.) However, *Euwema* did not deal with the issue presented here; and the fact that the Third Circuit "noted" some language from that case – which was relevant to the Third Circuit's opinion in *Todman* – does not impair the value of *Todman*, which is based on the plain reading of the statute in light of the principles enunciated in *Johnston*.

The language the Third Circuit quoted from *Euwema* came right out of *Johnston*.[7] Furthermore, *Euwema* is not inconsistent with *Todman* and *Johnston*. In *Euwema*, the

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[7] The *Euwema* court quoted from Am. Jur. 2d, "Elections," § 310, p. 135 (1966 ed.). 323 F. Supp. at 171. That section of Am. Jr. 2d is based on and cites to *Johnston*.

Virgin Islands district court held that a particular measure that was voted on at the general election, and did not receive a majority of the votes of those persons voting at the general election, nevertheless had passed because it had received *a majority of the votes of those who actually voted on the particular measure*. The court did not consider the number of all the "qualified voters" (even though that was actually what the relevant election statute required) nor did it even consider the total number of voters voting at the general election at which the measure was voted on, in determining whether the measure had passed by a majority. Only the number of voters who actually voted on the particular question was considered, in determining whether the measure had received a majority. "To hold otherwise," said the *Euwema* court, "would be to permit an indifferent minority to prevent a determination of issues and thus impede or totally obstruct vital governmental processes and interests." 323 F. Supp. at 171.

So, too, here. No choice in a gubernatorial election is expressed by persons who cast no vote in that race, even if such persons cast a vote for a different elective office on the same ballot. Those persons are in the same situation as to the gubernatorial race as the voter who stayed home on election day. It would be an intolerable result if an "indifferent minority" – those who voted on other races at the general election but chose not to vote in the gubernatorial race – could require a second election. Clearly, this is not what the statute requires.

III. THE RELEVANCE OF STATE AND TERRITORIAL LAW

Respondents argue that the laws of various states (Nebraska, Oklahoma and Georgia) should be consulted to interpret 48 U.S.C. § 1422. (Respondents' Brief 17-18.) They also argue that California law, in particular, should be considered. (Respondents' Brief 18-20.) Their position is unsound.

The California state law decisions relied on by respondents to support their interpretation of 48 U.S.C. § 1422 are neither relevant nor apposite. First, while the courts give deference to California law in interpreting *Guam statutes* (to the extent that the Guam Code is based on particular California statutes),[8] Section 1422 is a federal statute. Federal courts do not look to California law in interpreting a federal statute. *Johnston*, instead, is applicable.

Second, California law does not contradict or undermine *Johnston*. To the contrary, the California Supreme Court, in *Law v. City and County of San Francisco*, 144 Cal. 384, 77 P. 1014 (1904), echoed the principle of following the expressed will of the majority: "Universally courts have been reluctant to defeat the fair expression of the popular will in elections, *unless the plain mandate of the law permitted of no alternative.*" 144 Cal. at 394 (emphasis added).

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[8] *See, e.g., People of the Territory of Guam v. Borja*, 732 F.2d 733, 735 (9th Cir. 1984); *Smith v. Lujan*, 588 F.2d 1304, 1306 (9th Cir. 1979); *Roberto v. Aguon*, 519 F.2d 754, 755 (9th Cir. 1975).

In any event, the California cases relied on by respondents are inapposite. Each turned on the specific language of the provision at issue, and, in some cases, its legislative history.[9] In the California cases cited by respondents, the language being construed was "thereat" or "voting at." *See City of Santa Rosa v. Bower*, 142 Cal. 299, 301-02, 75 P. 829 (1904) ("thereat"); *People v. Town of Berkeley*, 102 Cal. 298, 303, 36 P. 591 (1894) ("voting at"); *People v. West Side County Water District*, 112 Cal.App.2d 228, 230-31, 246 P.2d 119 (1952) ("votes cast at"); *People ex rel. Smith v. City of Woodlake*, 41 Cal.App.2d 119, 120, 106 P.2d 71 (1940) ("thereat"). These terms do not appear in 48 U.S.C. § 1422.

These California cases contain no relevant overarching principles of statutory construction; they merely address the language of particular California state statutes, constitutional provisions, or city charters, often in the context of the legislative history of, or elucidating amendments to, those provisions. Moreover, the California cases pertained to completely different types of events than the Guam gubernatorial race. None involved an election of an individual to political office or a runoff election. Each referred to a referendum in which a bond measure, proposition or similar issue was either approved or rejected. *See, e.g., City of Santa Rosa v. Bower*, 142 Cal. at 300 (ratification of city charter); *People v. Town*

[9] For example, in *City of Santa Rosa v. Bower*, 142 Cal. 299, 75 P. 829 (1904), the amendment of the constitutional provision at issue, from "electors voting thereat" to "electors voting *thereon*," was held to elucidate the meaning of the provision ("thereat" meaning votes cast at the election, and "thereon" meaning votes cast *upon* the particular proposition at issue). 142 Cal. at 301-02.

of Berkeley, 102 Cal. at 304 (proposition for reorganization); *People v. West Side County Water District*, 112 Cal.App.2d at 229 (formation of water district); *People ex rel. Smith v. City of Woodlake*, 41 Cal.App.2d at 119 (incorporation of city).

The policy considerations underlying rules for when to conduct a runoff election differ dramatically from those involved in statutes relating to the requirements of passing such referenda. In no event would the time or expense of a runoff election be required in these referenda. Thus, counting ballots in which no vote was cast on the proposition at issue (but a vote was cast on a different proposition) merely raises the bar a notch for approval of the measure – if ballots on which no vote was cast with respect to the specific proposition are counted in determining whether a majority approved the proposition, it necessarily will be harder to pass the measure. As a matter of policy, one could choose to make it more difficult to pass certain types of propositions. No analogous policy would be served by requiring the counting of blank ballots on which the voter expressed no choice for Governor. Because the policy concerns underpinning referenda and elections of government officials are so different, the California courts' decisions on referenda have no bearing on the proper interpretation of 48 U.S.C. § 1422.

With respect to respondents' reliance on state law cases out of Nebraska, Oklahoma, and Georgia, those cases also do not address the language of the federal statute at issue here. *See Thurston County Farm Bureau v. Thurston County*, 136 Neb. 575, 287 N.W. 180 (1939) (court determined legislative intent based on change in the statute by which legislature had intentionally omitted the

term "voting on the question" in order to require counting of " 'all votes cast' " at the election); *Allen v. Burkhart*, 377 P.2d 821 (Okla. 1962) (held that (i) the governor could not call a special election on an initiative to amend the Oklahoma Constitution on the same day as the general election, and (ii) Oklahoma law required that amendments to the Oklahoma Constitution be adopted by an affirmative vote of more electors than a simple majority of those who cast a ballot upon the proposed amendment); *Stembridge v. Newton*, 213 Ga. 304, 99 S.E.2d 133 (1957) (statute provided "if a majority of those persons voting in such election vote for approval of the act, then it shall become of full force and effect"; held that only votes in favor of or opposed to act would be considered, and indecipherable ballots are "a nullity" and would be excluded (and not considered "votes cast") in determining whether act had been approved by a majority).

In fact, if this Court were to canvass case law from all the states, it would find that most of the cases are consistent with petitioners' position here – that a measure need receive only a majority of those actually voting on the measure. *See, e.g., Republican Party of Hawaii v. Waihee*, 68 Haw. 258, 709 P.2d 980 (1985) (blank ballots would not be deemed ballots voted, for purposes of determining whether or not there was majority in favor of measure: " 'The general view is that a qualified voter who succeeds in getting his name on the poll list and a ballot in the ballot box is not a voter unless his ballot is such as is prescribed by law, and that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes.' "); *Wooley v. Sterrett*, 387 S.W.2d 734 (Tex. 1965) (despite statutory requirement that proposition receive "a

majority of such voters, voting *at* such election," held that blank ballots would not be considered in determining whether proposition had passed by a majority; even under the specific statutory language, as a matter of law the proposition must obtain only "the majority of votes 'legally' cast and reflecting the free exercise of choice by the voters"; the word "vote" means affirmative act of choice and cannot be equated with failure of choice); *Chapel v. School District No. 8*, 334 Mich. 176, 54 N.W.2d 209 (1952) (despite statutory language requiring measure to pass by "a majority of the school electors," only a majority of those actually voting would be required; " 'it is contrary to our system of government to count electors on a question who are not sufficiently interested to vote' "; " 'voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result.' "); *Munce v. O'Hara*, 340 Pa. 209, 16 A.2d 532 (1940) (despite statutory language that proposition must receive "a majority vote of [the county's] qualified electors cast at any general election," only a majority of the votes cast on the particular proposition was required, in keeping with "the great weight of authority"; " 'those who come to an election and cast a blank ballot in principle are no more efficacious in expressing their convictions than those who absent themselves altogether' "); *State of Washington v. Clausen*, 72 Wash. 409, 130 P. 479 (1913) (despite statutory language requiring approval of proposition "by three-fifths of the qualified voters of the said city or town voting at said election," illegal or rejected ballots would not be considered; "only those ballots that

express the voter's choice with such clearness that the ballot can be counted either for or against the submitted proposition, can be counted in the totals").

Nevertheless, it is submitted that if *any* non-federal law is to be consulted, it ought to be the election laws of Guam, which expressly address the issue and direct that ballots left blank as to a particular race are not to be counted for purposes of that race. As provided in the Guam Election Code, *"if for any reason it is impossible to determine [a voter's] choice for any office, his ballot shall not be counted for that office."* 3 Guam Code Ann. § 11114 (emphasis added). *See also* 3 Guam Code Ann. § 11111 ("At any election, any ballot which is not marked as provided by law shall be void . . . ").[10]

When Congress passed 48 U.S.C. § 1422, it was with knowledge and approval of the Guam election statutes providing that ballots blank as to a particular race are not counted with regard to that race. *See Ramsey v. Chaco*, 549 F.2d 1335, 1338 (9th Cir. 1977). Therefore, if it is advisable to supplement *Johnston*, Guam election law can adequately do so. It is certainly more germane than Nebraska, Oklahoma, Georgia, or California state law

[10] Respondents misstate these statutes as providing that irregular ballots "are not counted *in favor of* any candidate for the office as to which they are invalid," and argue that therefore they do provide for counting these ballots as "votes cast" for determining whether a majority has been obtained in that race. (Respondents' Brief 23 (emphasis added).) The statutes say no such thing, and, in fact, state that the entire *ballot* shall not be counted for that race.

cases construing statutes with different language, history and purpose.[11]

IV. SECTION 1422 DOES NOT REQUIRE A RUNOFF ELECTION WHEN ONE OF THE TWO SLATES OBTAINED A MAJORITY OF THE VOTES CAST BY THOSE WHO CHOSE TO VOTE

Section 1422 provides that the Governor and Lieutenant Governor of Guam shall be elected "by the casting by each voter of a single vote applicable to both offices." The majority of the votes cast shall determine the winner. In the November 3, 1998 election, the Gutierrez slate got the majority of the votes validly cast as defined by statute. No purpose would be served by requiring a "runoff election" between the two slates "receiving the highest and second highest number of votes cast" when there

[11] In fact, a Guam Court has recently decided what it means to "vote" under Guam law. The Guam Superior Court has decided the case of *Ada v. Gutierrez*, raising the issues of this case in the Guam Court, and claiming voting fraud. The Guam Superior Court both found that Ada's claims of voting fraud in the November 3, 1998 election were without basis, and ruled regarding the applicability of the Guam statutes to these issues. Specifically, the Guam Superior Court held that blank ballots (as well as double-voted ballots and ballots on which the oval for write-in votes was filled in but no name was written in) should not be counted in determining whether a majority had been obtained. The Court also explained how several of the Guam statutes which regulate voting related to the determination of "votes cast" in the gubernatorial election; and decided the issue now before this Court, that is, that blank ballots should not be included in determining the majority under Section 1422. *Ada, et al. v. Gutierrez, et al.*, Case No. CV 2765-98 (Feb. 16, 1999) (Appellants' Additional Citations, filed Feb. 24, 1999), at 69-85.

were only two slates running, and one already obtained the majority of the votes cast.

Respondents try to rebut this argument by positing the situation of a close, two-slate race in which a *write-in candidate* garners enough votes to prevent either of the two slates from obtaining a majority. Respondents argue that, under this scenario, "[t]here can be no question that under section 1422, a runoff would be required." (Respondents' Brief 24-26.) This is true. But that is not the issue presented in this case. There is an enormous – and dispositive – difference between a vote for a write-in candidate for Governor and *not voting* for anyone for Governor; one is a "vote cast," the other is not.

Respondents also argue (without citation to any authority) that the purpose of Section 1422 is to confer legitimacy on the winner by requiring him to obtain more than 50% of the votes of "all those who *went to the polls and participated in the election*." (Respondents' Brief 26-27.) However, Section 1422 does not talk about either going to the polls or "participating in the election." It speaks only of "votes cast" – specifically, "by the casting by each voter of a single vote applicable to both offices."

There is no room in the statute for respondents' interpretation that those who chose *not to cast a vote* in the gubernatorial election should nevertheless be counted as having cast a vote. The argument is inconsistent with the plain meaning of the statute, the House of Representatives' interpretation of the statute, applicable federal law,

the majority of the state law cases, and the Guam Election Code.[12]

CONCLUSION

For all of the foregoing reasons, as well as those stated in petitioners' opening brief, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and that portion of the judgment affirming the District Court of Guam's order directing

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[12] Respondents argue that, in a runoff election under Section 1422, a candidate need obtain only a plurality, not a majority of the votes cast. (Respondents' Brief 25, note 13.) The two cases cited by respondents do not support this proposition. In *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993), the operative statute explicitly addressed the number of votes required to win a *runoff* for that office: *"the highest number of the votes cast in such run-off . . . election"* (emphasis added), as contrasted to the requirement of a *majority* in the initial election. 813 F. Supp. at 823, n.1. No such language appears in the statute at issue here, 48 U.S.C. § 1422. And the other case relied upon by respondents, *Cunningham v. Queen*, 96 S.W.2d 798 (Tex. Civ. App. 1936), holds contrary to respondents' argument. The court states that the purpose of a runoff is to have a contest between the two candidates receiving the highest number of votes, but not a majority, in the *initial* election; and goes on to state that the winner must obtain a *majority* in the *runoff* election, as well. 96 S.W.2d at 799-800.

runoff elections for Governor and Lieutenant Governor of Guam should be vacated.

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Respectfully submitted,

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